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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 173

AMERICAN BOILER MANUFACTURERS ASSOCIATION,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD

and

LOCAL UNION 455 of the UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF FOR LOCAL UNION 455 OF THE UNITED ASSOCIATION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 23-38) is reported at 404 F. 2d 547. The court's earlier opinion (Pet. App. 62-74) is reported at 366 F. 2d 815. The Board's initial decision and order (Pet. App.

42-61) are reported at 154 NLRB 285, and its supplemental decision and order (Pet. App. 75-85) are reported at 167 NLRB No. 79.

JURISDICTION

Local Union 455 of the United Association ("Union") adopts the statement of "Jurisdiction" contained in the Brief of the National Labor Relations Board ("Board") in Opposition (Br. 1-2).

QUESTION PRESENTED

The Union adopts the statement of the "Question Presented" contained in the Board's Brief (Br. 2).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151 et seq.), are set forth at Pet. App. 86-87.

STATEMENT

A. BACKGROUND AND FACTS

Local Union 455 represents pipefitters in the St. Paul, Minnesota area. It is affiliated with the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO. Pipefitters (also called steamfitters) employed on construction projects in the St. Paul area claim the right to install at construction sites all plumbing and pipefitting systems, including the installation of external trim piping on boilers (R. 388-391).[1] The Union has been in existence for approximately 60 years, and has about 500 members (R. 340, 341).

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[1] "R" references are to the Joint Record in the court below.

Pipefitters are employed by plumbing, heating and mechanical contractors. The St. Paul Association of Plumbing, Heating and Mechanical Contractors has for many years entered into collective bargaining agreements with the Union on behalf of its member employers.[2] (Pet. App. 64). The collective bargaining agreement negotiated by the Union and the Association in 1963 contained a "fabrication clause" that required certain work be performed by the pipefitters employed in the bargaining unit.[3] Included among this work is the external trim piping on boilers (R. 380, 388). This clause provided:

"Article II.

. . .

(c) Fabrication.

"As a primary working condition, it is agreed that all pipe formations, systems or controls, or component parts thereof, included within the non-purchase list attached hereto and made a part hereof as Exhibit I, as amended from time to time as provided in this agreement, shall be fabricated on the job site or in the shop of an Employer within the bargaining unit who is bound by this agreement, except as otherwise mutually agreed upon with relation to any particular job.

. . .

"Exhibit I. Non-Purchase List.

. . .

"2. On boilers, all piping beyond the gas and oil burners proper and trim piping on those boilers 30 horsepower or more" (R. 4, 33, 34, 380, 388).

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[2] In addition, the Union also has collective bargaining agreements containing fabrication clauses with practically all the independent mechanical contractors in the area (R. 341, 356).

[3] The agreement was effective from May 1, 1963 to April 30, 1966 (R. 33).

The agreement also provided for the establishment of a joint Employer-Union fabrication committee which was to apply, interpret and police the fabrication clauses. The membership on such committee was divided equally between the Union and the Employer Association (R. 380, 381).

1. "Field-Assembled" and "Shop-Assembled" Boilers.

For many years prior to the mid-1950s, boilers to be installed in building heating systems in St. Paul were shipped to jobsites with no external trim piping attached. In this stripped state, a boiler is normally referred to as a pressure vessel (R. 131). The work of attaching the trim piping was done by Union-represented pipefitters working on the particular jobsite and the completed boiler was referred to as "field-assembled" (R. 30, 178).

Several years ago, member manufacturers of the American Boiler Manufacturers Association ("ABMA") began manufacturing boilers with the trim piping attached to the boiler at the factory. The trim piping consists of accessory piping such as water columns, low-down lines, fuel piping, control valves, etc. (R. 130, 161). With the trim piping attached at the factory, the boilers are known as packaged or, in the words of the ABMA, "shop-assembled" boilers as distinguished from "field-assembled" boilers (Pet. 3; R. 130, 131).

The use of packaged boilers has a substantial impact on the amount of work available for pipefitters on a jobsite because installation of the trim piping provides about two days work for two men on each installation (Pet. App. 24; R. 32-33, 350). Installation of the trim piping in the factory is only a small part of the over-

all manufacture of the boiler; the installation of the trim piping in the plant amounts to less than 1% of the cost of the packaged boiler.[4]

The change that occurred with the introduction of the packaged boiler is simply that trim piping work is done in the plant rather than in the field, i.e., it is "shop-assembled" rather than "field-assembled." Or, in the words of the manager of the ABMA, the difference is in the "concept of sending these five components to the field separately or assembling and sending them as a unit" (R. 294).

The pipe, fittings and valves used on the trim piping installed in the plant are generally standard items not manufactured by the boiler companies, but purchased from vendors and simply fabricated and installed in the plant. Similar materials are used when boilers are field-assembled (R. 217, 319, 368). Similar methods and equipment are also used in fabricating the trim piping, whether done in a factory or on jobsite (R. 291, 292, 351, 371).

2. The History of the Fabrication Clause.

Packaged boilers dribbled into the St. Paul area prior to the mid-1950s. In 1958, about 10% of the boiler installations in that area were packaged boilers (R. 31, 167, 352).[5] Realizing at this time that the use of packaged boilers was decreasing the amount of the pipefitters' traditional jobsite work, the Union attempted

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[4] Computed from the cost of packaged boilers and the wage rate of the in-plant employees (R. 204, 219, 286).

[5] The court below used a "mid-1940s" date (Pet. App. 24). This is incorrect. In the original decision of the court, it correctly used the "mid-1950s" date (Pet. App. 64).

to obtain a fabrication clause in its 1959 and 1961 contract negotiations which would preserve to the employees in the bargaining unit the trim piping work. It was unable to obtain such a clause, either time, but in 1963 the Union was successful and negotiated the clause set out above.[6] (Pet. App. 24, 45, 65, 78; R. 109-110, 123, 127, 344-345).

By 1963, packaged boilers were being used more frequently; they then comprised somewhere between 60 and 85 percent of all new boiler installations in the St. Paul area (Pet. App. 24, 64; R. 31, 272, 294, 353, 365). However, 90% of all existing boilers in use in the area were field-assembled boilers with the trim piping installed on jobsite by pipefitters (R. 371).

The Pipefitters represented by the Union are skilled in the necessary job tasks involved in fabrication and installation of trim piping. The Union has a highly coordinated apprentice training program operating under city and state standards (R. 342). Before an apprentice can become a journeyman pipefitter and work in the field of gas, oil or steam installations, he must pass examinations and obtain certificates of competency from the city and state (R. 341, 359).

In addition, all boiler installations are thoroughly inspected during and after each installation. The inspection is required whether the boiler is field-assembled or packaged, or whether testing has been done at the factory where the boiler was manufactured (R. 360-363). Field-assembled boilers meet the necessary requirements for insurance purposes as do packaged boilers (R. 369).

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[6] See page 3, *supra*.

3. Implementation of the Fabrication Clause.

After the fabrication clause became effective in 1963, it came to the attention of the Union that packaged boilers, with the external trim piping already attached, were being obtained for certain construction projects in the St. Paul area and were to be installed by mechanical contractors employing pipefitters represented by the Union (R. 4, 10, 12). When the Union advised mechanical contractors that all fabrication work in connection with the external trim piping had to be performed by the pipefitter employees at jobsite, disputes arose.

The Union had a dispute with mechanical contractor Hickey on a 3-M project; with mechanical contractor Pierre Aircon on the Deluxe Check Building; and with mechanical contractor Upper Midwest Piping on the Rosemont School project.[7] As a result of these disputes, the ABMA filed unfair labor practice charges against the Union.

The Union was charged under Section 8(e) of the Act with entering into agreements (allegedly illegal under Section 8(e)), interpreting, construing and applying the "fabrication" clause in its collective bargaining agreement (R. 83-85). The Union was also charged with violating Section 8(b)(4)(ii)(A) of the Act, which prohibits, *inter alia,* forcing or requiring any employer ". . . to enter into any agreement which

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[7] The Union adopts the description of these disputes contained in the Board's Brief in Opposition (Br. 4-7). The ABMA in its Petition discusses at length the Union's activity on the 3-M project. The Board, in its initial decision, found this conduct violated Section 8(b)(4)(ii)(B) of the Act (Pet. 8-10; Pet. App. 50-51). The court of appeals, in its earlier opinion, affirmed this finding (Pet. App. 73-74). The Union did not seek certiorari.

is prohibited by Section 8(e)." Finally, the Union was charged with threatening and coercing the mechanical contractors' association and other employers and inducing their employees, under Section 8(b)(4)(i)(ii)(B), with an object of forcing them to cease doing business with certain other employers and certain boiler manufacturers, members of ABMA (R. 90-93).[8]

ARGUMENT

1. The Board's finding in this case, affirmed by the court of appeals, is that the object of the fabrication clause was "to preserve for employees in the unit work traditionally done by such employees who are represented by Local Union No. 455, not for members of the union generally, nor to satisfy union objectives elsewhere." (Pet. App. 79).

This result was reached after the Board applied the tests laid down by the Court in 1967 in *National Woodwork Manufacturers Association* v. *National Labor Relations Board,* 386 U.S. 612. The Board considered all the "surrounding circumstances" as instructed by *National Woodwork,* such as the displacement of jobsite work by packaged boilers, the fact that the Union had no contact with or interest in the boiler manufacturers or their employees, and the fact that jobsite pipefitters had traditionally installed trim piping on boilers. Consideration of these factors supports the Board's conclusion and its affirmance by the court below, "that the clause met the 'touchstone of being addressed to the labor relations of the contracting em-

[8] The Union adopts the Board's discussion of its conclusion and order and the decision of the court below contained in the Board's Brief (Br. 7-9).

ployer vis-a-vis his own employees,' and that the evidence does not show that the 'tactical object' of the clause was the packaged boiler manufacturers or any other secondary employers" (Pet. App. 80).[9] An attack on this decision, then, necessarily presents an issue that is factual in nature and dependent upon the circumstances of each case. See *NLRB* v. *Carpenters District Council of Kansas City and Vicinity,* 398 F. 2d 11 (8th Cir., 1968); and *Getreu* v. *Local Union No. 98 Sheet Metal Workers' International Ass'n,* 291 F. Supp. 638, (D.C.S.D. Ohio, 1968). In this situation, it is suggested that review by this Court is inappropriate.

2. In determining that pipefitters have traditionally installed trim piping on boilers and have a legitimate interest in preserving that work, the Board and the court of appeals properly analyzed the evidence in light of *National Woodwork.* There, as here, the Union-represented employees had for many years performed the disputed work on jobsite. Threatened with a loss of this work, and to regain or "reacquire" the work that was lost to the jobsite carpenters, the union in *National Woodwork* obtained the "will-not-handle" clause in its bargaining agreement. Here, the Union was faced with the same situation and, after two unsuccessful attempts, also obtained a work preservation clause in its bargaining agreement. At the time the clauses were obtained and enforced, the unions in both cases were continuing to perform a substantial amount of the work on jobsite, had never abandoned any of the work, and were actively seeking the work they previously performed which had been taken off jobsite.

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[9] Quoting *National Woodwork,* 386 U.S. at 645.

In other words, as the court below pointed out, *National Woodwork* is not distinguishable from this case on the ABMA's theory that there the carpenters were "currently, continuously and exclusively" performing the work on jobsite that the clause sought to protect, since in fact, the record in *National Woodwork* shows the carpenters were attempting to "reacquire" as well as preserve work (Pet. App. 28, 29).

3. The other reasons advanced by the ABMA in support of its Petition are equally unpersuasive. The economic impact of the Union's work preservation clause on the boiler manufacturers may not be utilized to find the clause illegal; such arguments, also made in *National Woodwork,* should, as the court there stated, be addressed to Congress (386 U.S. at 644).

Finally, Petitioner relies on two decisions of the Board issued prior to *National Woodwork* and prior to the decisions of the Board and court below in this case. In view of *National Woodwork,* these cases lack current relevance.[10]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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[10] The "right of control" doctrine of the Board, rejected by the court below, is not raised in the Petition of ABMA except in a conditional fashion (Pet. 3, n.1). The Union opposes review by the Court of this issue also, but in view of its treatment by Petitioner, discussion here is unnecessary.